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IN THE

Supreme Court of the United States

SNOHOMISH COUNTY and STEPHEN HOLT,
Director, Snohomish County Department of
Planning and Development Services,

Petitioners,

v.

KIM GOBIN; GUY MADISON;
THE TULALIP TRIBES OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS KIM GOBIN AND GUY MADISON

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This case involves the efforts of Petitioner Snohomish County to regulate Indian development of Indian-owned fee lands within the Tulalip Indian Reservation in the State of Washington. The Ninth Circuit, in a unanimous opinion by Judge Stephen S. Trott, rejected Petitioner's argument that Congress expressly authorized such regulation as an "unprecedented extension" of existing law. Pet. App. 14a-15a. As Petitioner essentially acknowledges, the court of appeals' decision does not conflict with the decision of any other federal circuit court, any federal district court or any state court. Nor does it conflict with any decision of this Court or present a recurring legal issue: with the exception of this case, state authority to regulate Indian land use on Indian-owned fee lands in Indian country has been considered in only two trial court decisions (both of which held such regulations could not be sustained). Thus, this case involves only the unexceptional and correct application of well settled principles of law in a factual setting that rarely gives rise to litigation. This Court's review is unwarranted.

STATEMENT OF THE CASE

Respondent Kim Gobin, an enrolled member of a federally recognized Indian tribe (Respondent Tulalip Tribes), owns a 20-acre parcel of land within the Tulalip Reservation in fee simple. Pet. App. 5a; CA Excerpts 71 at 112.[1] Gobin

1. Lands on the Tulalip Reservation were allotted to tribal members, subject to restrictions on alienation, under the Treaty of Point Elliott, 12 Stat. 927 (Jan. 22, 1855). *See* Pet. App. 11a. The restrictions on alienation of the land at issue in this case were extended in 1934 by the Indian Reorganization Act, *see* 25 U.S.C. §§ 462, 464, but were removed in 1962 pursuant to the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C. § 483. The 1948 Act authorized (Cont'd)

and her brother (Respondent Guy Madison), also an enrolled member of the tribe, seek to develop a routine, 25-home residential subdivision on her land. Pet. App. at 6a-7a.

The tribe has a comprehensive tribal land use ordinance, which was designed to balance the need for housing and the preservation of natural resources on the reservation, in order to fulfill the purposes of the reservation as the tribe's homeland. *Id.* at 6a; CA Excerpts 84 at 64-66. The ordinance was approved by the Secretary of the Interior. Pet. App. 6a.

Gobin submitted an application to the tribe to subdivide and rezone the lands pursuant to the tribe's land use ordinance. *Id.* at 6a-7a. The tribe's professional staff reviewed the application, solicited comments from the county, and recommended that the application be approved with conditions. *Id.* at 7a; CA Excerpts 71 at 5-6, 111-18. The tribe's planning commission held a public hearing on the application, and also recommended that it be approved with conditions. Pet. App. 7a; CA Excerpts 71 at 5-7, 112, 130. The tribe's governing body formally approved the application at an open meeting based on the recommendations of the tribe's professional staff and planning commission. Pet. App. 7a.

In response to the tribe's request for comments, the county made *no* substantive objection to any aspect of the proposed development and did not seek to impose *any*

(Cont'd)
the Secretary of the Interior, "upon application of the Indian owners, to issue patents in fee, to remove restrictions on alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the [Indian Reorganization Act]."

conditions on it. *Id.* Neither the county nor anyone else opposed the development at the public hearing held by the tribe's planning commission or at any other stage of the tribe's land use process. *Id.*

County regulation would subject Gobin to a second regulatory process and, in conflict with the tribe's land use ordinance, the recommendations of the tribe's professional staff and planning commission, and the decision of the tribe's governing body, would prohibit the proposed residential development because it exceeds allowable housing densities under the county's zoning ordinance. *Id.* Gobin and Madison filed suit against the county seeking a declaratory judgment that the county lacked jurisdiction to regulate their planned development, and the tribe intervened as a plaintiff. *Id.* at 23a. The district court (Lasnik, J.), adhering to the deeply rooted policy of leaving Indians free from state jurisdiction and control, held that the county could not regulate the residential development at issue in this case. Pet. App. 30a, citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973).

In the court of appeals,[2] Petitioner relied extensively on *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992). In *Yakima*, the Court held that a State is without power to tax reservation lands and reservation Indians unless congressional intent to allow such state action is "unmistakably clear." The Court then held that, in authorizing the removal of restrictions on alienation of Indian lands in sections 5 and 6 of the General Allotment

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2. The United States submitted a brief and argued in the court of appeals as *amicus curiae* in support of Gobin, Madison and the tribe.

Act, 25 U.S.C. §§ 348 & 349, Congress had clearly authorized the imposition of *ad valorem* property taxes on such lands. 502 U.S. at 263-66. However, the Court also held that the removal of restrictions on alienation did *not* authorize imposition of excise taxes on the sale of Indian lands. *Id.* at 268-70. In so holding, the Court emphasized that an excise tax was not a "taxation of land" as that term was used in the General Allotment Act, because an excise tax is a tax on the activity of selling land rather than a tax on the land itself. *Id.* at 269.

The court of appeals (Brunetti, *Trott* and Tallman, JJ.) faithfully applied *Yakima*. It recognized, for example, that both this Court and prior panels of the Ninth Circuit had reaffirmed the holding that, in making reservation lands alienable, Congress made unmistakably clear its intent to subject the lands to state and local taxation. Pet. App. 13a-14a, discussing *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-15 (1998), and *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1358 (9th Cir. 1993). However, the court of appeals also recognized correctly that neither this Court nor the Ninth Circuit "has extended *County of Yakima* to find that Congress expressly authorized any other State regulation of the Indians when it made Indian fee lands freely alienable." Pet. App. 14a.

The court of appeals rejected the "unprecedented extension" of *Yakima* sought by Petitioner on two grounds. *Id.* at 14a-15a. First, it held that "Congress's decision to make Indian fee lands freely alienable is not an express authorization or otherwise an 'unmistakably clear' indication that the County may enforce its in rem land use regulations over those lands," since "[u]nlike the inextricably linked concepts of (forced) alienation and taxation found in *County*

of Yakima, alienation and plenary in rem land use regulation are entirely unrelated." *Id.* at 15a. Second, just as the section 6 proviso authorized only "taxation of lands," it permits only "encumbrances of lands," not "[e]ncumbrances with respect to land or encumbrances of the transactions involving land or based on the value of the land." *Id.* at 16a. As Judge Trott explained:

> In this case, the County's land use regulations, which prohibit Gobin from building her subdivision, encumber the transactions and activities involving land. The objectionable County density requirement, in particular, does not burden the land itself, but rather burdens the use to which Gobin seeks to put the land. Indeed, apart from Gobin's proposed activities, the County's land use regulations have no force. These regulations resemble the excise tax in *County of Yakima*: Although tangentially related to land, they are not inextricably linked to the land itself.

Id. at 16a-17a.

The court of appeals also rejected Petitioner's argument that, under *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987), this case presented "exceptional circumstances" justifying county jurisdiction over the on-reservation activities of tribal members notwithstanding the lack of express congressional authority for such jurisdiction. Pet. App. 17a-19a. The court found that the assertion of county jurisdiction threatened to supplant the tribe's ordinances "and thus its attempt at self-government." *Id.* at 19a. This was not a "minimal burden" like the one condoned in *Moe v. Confederated Salish & Kootenai Tribes*,

425 U.S. 463, 483 (1976), but was directly contrary to the well-established policy of leaving Indians free from state jurisdiction and control. Pet. App. 19a. Even considering the county's interests collectively, the court found they did not "outweigh the [tribe's] interest in self-determination." *Id.*

Petitioner did not seek rehearing or *en banc* consideration in the court of appeals, but now seeks a writ of *certiorari* from this Court.

REASONS FOR DENYING THE PETITION

No other federal or state appellate court has addressed state or local regulation of on-reservation Indian development on Indian-owned fee lands. Petitioner does not allege that the Ninth Circuit's decision conflicts with the decision of *any* federal circuit court, *any* state court, or *any* federal district court.[3] Moreover, Petitioner does not challenge the legal tests employed by the Ninth Circuit to determine whether a county may regulate Indian activities on an Indian reservation. Petitioner challenges only the *application* of those tests to the particular circumstances of this case.

Petitioner first asserts that the court of appeals erred in declining to extend this Court's holdings authorizing

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3. We are aware of only two other trial court decisions that have addressed state regulation of Indian land use on fee lands in Indian country, and both decisions held, consistently with the holdings in this case, that such regulation could not be sustained. *See Narragansett Indian Tribe v. Narragansett Elec. Co.*, 878 F. Supp. 349, 361-62 (D.R.I. 1995), *rev'd on other grounds*, 89 F.3d 908 (1st Cir. 1996); *Dunn v. Nez Perce County*, No. CV 95-00423 (2nd Jud. Dist., Idaho) (5-29-96 Opinion and Order) (CA Supp. Excerpts 65 at 28-50).

ad valorem taxation of Indian fee lands to permit county land use regulation on such lands. However, this Court itself refused to extend its property tax holdings to authorize excise taxes on the sale of Indian fee lands, and *no* court has extended those holdings to authorize wide-ranging land use regulations as advocated by Petitioner in this case. Petitioner concedes "there appears to be no federal authority" for its argument, Pet. 10, which seeks an "unprecedented extension" of existing law. Pet. App. 14a-15a.

Even if there were merit to Petitioner's argument, it would provide no basis for review in this Court. The claim that a single appellate decision erred in applying a properly stated rule of law to a novel factual setting is not sufficient grounds for *certiorari*. Moreover, Petitioner's argument lacks merit in any event; in declining to make an unprecedented extension of existing law, the court of appeals' decision did not conflict with any decision of this Court.

Likewise, Petitioner's assertion that the court of appeals erred in making a fact-bound determination that Petitioner failed to identify "exceptional circumstances" justifying county regulation does not provide a sufficient basis for granting the writ. Petitioner again seeks to extend this Court's decisions in an unprecedented manner, contending that decisions limiting tribal jurisdiction over *non-members* should be read to limit the importance of tribal self-government in a case involving jurisdiction over *tribal members*. No court has interpreted this Court's decisions in this manner.

Finally, Petitioner's concerns about land use regulation in *other, hypothetical* cases – such as cases involving mixed Indian and non-Indian landownership or development efforts,

cases in which the governing tribe has not enacted or enforced its own land use regulations, or cases involving truly extraordinary land uses such as nuclear waste repositories – are simply not presented here. Such concerns are best left to resolution by the involved tribes and affected state and local governments in the first instance and, if necessary, to further consideration by the lower courts. At this point, the nature and scope of the problem (if any) arising from on-reservation Indian development of Indian-owned fee lands and the full range of available solutions are uncertain. The very limited number of judicial decisions addressing this issue suggests that such development has not given rise to any important problems warranting intervention by the lower federal courts, much less this Court's review.[4]

I. *CERTIORARI* IS NOT WARRANTED BECAUSE PETITIONER CONCEDES THE NINTH CIRCUIT APPLIED THE CORRECT LEGAL TESTS AND THERE IS NO CIRCUIT CONFLICT.

In the lower courts, Petitioner "agree[d] that the law permits a state or local government to exercise jurisdiction over the on-reservation activities of tribe members only when doing so is expressly authorized by Congress, or when

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4. Although Petitioner asserts it has traditionally exercised jurisdiction over reservation fee lands without reference to tribal affiliation, Pet. 4, the record indicates otherwise. *See* CA Excerpts 71 at 8 (county hearing examiner has for some years taken the position that county has no land use jurisdiction over reservation fee lands owned by tribal members); CA Supp. Excerpts 65 at 27 (quite a few years ago county council, on advice of prosecuting attorney, concluded county did not have jurisdiction over fee lands owned by tribal members). The record does not reveal that this has resulted in any significant problems for the county.

'exceptional circumstances' justify the exercise of such jurisdiction." Pet. App. 24a, citing *Cabazon*, 480 U.S. at 214-16. The district court and the court of appeals applied the "express authorization" and "exceptional circumstances" tests to determine whether Petitioner could regulate Respondent Gobin's development. Pet. App. 12a-19a, 24a-30a. These are the same tests Petitioner advances here. *E.g.*, Pet. 6-7.

Petitioner does not challenge the use of these tests, but only their application to regulation of on-reservation Indian development of Indian fee lands in this case. Since Petitioner concedes that this is the first circuit court decision to address this issue, and that there is no conflict among the circuits (or state or district courts), Petitioner's assertion that the court of appeals erred in applying the correct rule of law to this particular factual setting falls far short of satisfying this Court's criteria for issuance of the writ. *See* SUP. CT. R. 10.

II. *CERTIORARI* IS NOT WARRANTED BECAUSE THE COURT OF APPEALS' APPLICATION OF THE "EXPRESS AUTHORIZATION" AND "EXCEPTIONAL CIRCUMSTANCES" TESTS DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

A. "Express Authorization."

Petitioner argues that treaties and statutes authorizing the allotment of reservation lands to individual tribal members, and providing for the removal of restrictions on alienation of such lands, expressly authorize state and local governments to regulate the use and development of such lands. Petitioner also argues that the Burke Act of 1906,

which amended section 6 of the General Allotment Act and provided for the removal of "all restrictions as to sale, incumbrance, or taxation of [certain fee-patented] lands," expressly authorizes such land use regulation. Pet. 9-12.

Petitioner concedes that neither this Court nor any other court has ever so held, but contends that the court of appeals' rejection of these arguments "conflicts with the reasoning and import of *County of Yakima* and *Goudy v. Meath*, 203 U.S. 146 (1906)," two cases upholding the imposition of *ad valorem* property taxes on Indian fee lands. Pet. 10. However, in *Yakima*, 502 U.S. at 268-70, this Court itself declined to extend its property tax holding to authorize an excise tax on the sale of Indian fee lands. This case presented, for the first time, the issue whether the property tax holding should be more broadly extended to land use regulation of Indian fee lands. In the absence of any conflicting federal or state court decisions, the court of appeals' resolution of this novel issue does not warrant review in this Court.

Moreover, contrary to Petitioner's argument, the court of appeals' holding was entirely consistent with the "reasoning and import" of this Court's decisions. Citing *Goudy*'s discussion regarding alienability, Petitioner contends that

> [j]ust as it would be strange to allow a tribal member to sell his fee land without restriction while exempting the land from taxation, it would be strange to allow a tribal member to sell his fee land without restriction while exempting the land from zoning and development restrictions that apply to all other lands on the open market.

Pet. 11. However, when Congress provided for the removal of restrictions on alienation on Tulalip Reservation lands in the 1855 Treaty of Point Elliott, and when it enacted the General Allotment Act in 1887, there were no "zoning and development restrictions"; zoning regulation did not begin in this country until the turn of the century, over 45 years after the Treaty was made and over a decade after the General Allotment Act was enacted. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). Moreover, unlike the *explicit* provision in the Burke Act proviso subjecting fee-patented reservation lands to taxation, there is no explicit provision in the Treaty of Point Elliott, the General Allotment Act, or any other law subjecting fee-patented reservation lands to zoning and development restrictions. And, as the Court held in rejecting the excise tax in *Yakima*, 502 U.S. at 268, the fact that Petitioner's argument may "be fully in accord with Goudy's emphasis upon the consequences of alienability" is not sufficient to sustain county regulation where such regulation is not unambiguously sustained by statutory language.

Petitioner also argues that its land use regulations are authorized "encumbrances of land" under the Burke Act. Pet. 11. However, because lands on the Tulalip Reservation were not allotted under the General Allotment Act, the Burke Act is not directly applicable here. *See United States v. Celestine*, 215 U.S. 278, 288-89, 291 (1909). Moreover, to the extent it sheds light on Congress' intent in the treaty and statutes that do apply to the Tulalip Reservation,[5] the Burke

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5. Neither the 1855 Treaty of Point Elliott nor the 1948 Act, under which restrictions on alienation were removed from the lands at issue in this case, provides for the removal of restrictions on "encumbrances" of land. *See* note 1 *supra*.

Act does not support Petitioner's argument. When the Burke Act was enacted, "incumbrance" was defined as "[a]ny right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee" or "[a] claim, lien, or liability attached to property; as a mortgage, a registered judgment, etc." HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 613 (1st ed. 1891).[6] This definition does not fairly encompass general regulatory burdens, such as zoning and other land use regulations, since such regulations are not reasonably viewed as giving the state a "right to, or interest in, land," and they are not a "claim, lien or liability attached to property." Thus, it is likely that, in providing for the removal of restrictions on the "sale, taxation, or incumbrance" of land in the Burke Act, Congress intended only to authorize encumbrances such as liens, mortgages, leases and easements that would enable the fee-holders not only to sell their lands, but to convey property interests short of the full fee title. *Cf. Yakima*, 502 U.S. at 255 (noting that Congress ended the allotment era in 1934 without "impos[ing] restraints on the ability of *Indian allottees* to alienate or encumber their fee-patented lands") (emphasis added). The authorization of such encumbrances by Indian landowners is a far cry from the authorization of general regulatory burdens by state and local governments.

As *Yakima* makes clear, 502 U.S. at 268-69, even if the term "encumbrance" *could* be interpreted more broadly to encompass land use regulations, that would not be not sufficient to sustain Petitioner's position. Thus, while Petitioner notes, Pet. 11-12, that, in *Santa Rosa Band of*

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6. "Encumbrance" is defined in substantially the same way today. *See* BLACK'S LAW DICTIONARY 527 (6th ed. 1990).

Indians v. Kings County, 532 F.2d 655, 667 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), the Ninth Circuit held that the prohibition on "encumbrances" in Public Law 280 included traditional land use regulations, it fails to note that the court found that the term "encumbrance" is *ambiguous* and, consistent with the Indian canons of construction, construed it to *prevent* state and local zoning regulation on trust lands. *Id.* at 667. The same canons dictate that the term "encumbrance," as used in the Burke Act, does not authorize state and local regulation of Indian-owned reservation fee lands. *See Yakima*, 502 U.S. at 269.

Moreover, as Judge Trott explained, "[d]espite the inherent ambiguity in the word 'encumbrance' standing alone, here the operative phrase is 'encumbrance *of land*.'" Pet. App. 16a (emphasis in original).

> The prepositional phrase "of land" necessarily limits the scope of permissible encumbrances. Encumbrances with respect to land or encumbrances of the transactions involving land or based on the value of the land, therefore, are not permitted.

Id., citing *Yakima*, 502 U.S. at 269. Since the county regulations at issue here do not burden the land itself, but rather the use to which Gobin seeks to put the land, they resemble the excise tax in *Yakima* and have not been expressly authorized by Congress. Pet. App. 16a-17a.

Petitioner's attempt to read the Burke Act proviso to authorize general land use regulations of fee-patented lands also suffers from the fact that, while Congress addressed general state and local regulatory authority in section 6 of

the General Allotment Act, this Court has held that those provisions do not apply to Tulalip allottees or to any Indian owners subsequent to original allottees. *See Celestine*, 215 U.S. at 288-89, 291; *Yakima*, 502 U.S. at 262. Petitioner seeks to avoid these holdings by analogizing land use regulations to the *ad valorem* property tax in *Yakima*, contending that "land use ordinances often regulate the condition of the land itself and authorize enforcement against the land without reference to persons." Pet 11. However, Petitioner does not contend that, under Washington law, liability for compliance with land use ordinances "flows *exclusively* from ownership of realty," or that such ordinances "create[] a burden on the property *alone*" – the grounds on which this Court upheld the *ad valorem* property tax. *See Yakima*, 502 U.S. at 266 (emphasis added).

It is eminently reasonable, as the court of appeals held, to view land use regulations as restrictions on the Indian's activity of using the land, just as *Yakima* viewed the real estate excise tax as a tax on the Indian's activity of selling the land. The fact that such restrictions may be *enforced* against the land, just as the real estate excise tax could be enforced against the land, does not change the result: because the restrictions limit the Indian's activity of using the land they are "void, whatever means may be devised for [their enforcement]." *Yakima*, 502 U.S. at 269.

Finally, Petitioner's argument would produce a result specifically rejected in *Yakima*, since it would validate "all sorts of state [regulation] of reservation-Indian activities" by merely targeting the regulation at the land. *Id.* For example, a state could prohibit the use of land for gaming purposes, the operation of Indian smoke shops, or other activities that this Court has held are beyond the permissible

scope of state regulation. *See Cabazon*, *supra*; *Moe*, *supra*. In rejecting such an approach in this case, the court of appeals' decision faithfully applied *Yakima* and does not conflict with any decision of this Court.

B. "Exceptional Circumstances."

Petitioner asserts that the court of appeals "misconstrues and misapplies the exceptional circumstances test" in "failing to discuss the nature of tribal sovereignty on unrestricted fee lands and by failing to discuss how County jurisdiction would impact actual federal and tribal interests in the regulation of private development on those lands." Pet. 13. Petitioner cites *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), for the proposition that tribal authority to impose zoning restrictions is diminished on reservation fee lands, and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), for the remarkable proposition that there is "no tribal interest" in development activities undertaken by tribal members on a reservation. Pet. 14-18. Petitioner then asserts that hypothetical problems that might arise from its inability to regulate development of Indian-owned fee land outweigh these allegedly diminished tribal interests. *Id.* at 19-22.

Neither *Brendale* nor *Colville* address the application of state or local land use regulations to tribal members on a reservation. In *Brendale*, the issue was tribal regulation of *non-members*, and *Colville* involved a requirement that Indian vendors collect cigarette taxes from *non-members*. This Court itself has limited the application of *Colville*, holding that it does not support state regulation of Indian gaming enterprises on a reservation. *See Cabazon*, 480 U.S. at 217-19.

Petitioner does not allege that any court has read *Brendale* or *Colville* to limit a tribe's interest in regulating the on-reservation development activities of tribal members. Further, Petitioner does not allege that the court of appeals' application of the exceptional circumstances test conflicts with the decision of any other federal or state court. Thus, even if Petitioner's interpretation of *Brendale* and *Colville* had merit, it would not warrant review in this Court. Once again, an allegation of error in a single appellate decision addressing a novel legal issue does not provide sufficient grounds for review in this Court. *See* SUP. CT. R. 10. Moreover, Petitioner's novel interpretation of *Brendale* and *Colville* lacks merit and, indeed, is in conflict with bedrock principles of this Court's Indian jurisprudence. The ability of tribal members to make their own laws and be governed by them lies at the heart of tribal self-government, and nothing in *Brendale* or *Colville* minimizes the importance of tribal self-government in this case.

Similarly, *certiorari* is not warranted to correct the lower courts' factual application of the exceptional circumstances test. The hypothetical problems identified by Petitioner were carefully considered by the lower courts, and provide no basis for overriding the important federal and tribal interests at stake here. Indeed, notably absent from the Petition (and the entire record in this case) is any suggestion that the modest development at issue here will have any material adverse impact on the county or its residents, let alone that it presents an "exceptional circumstance" warranting county regulation of the on-reservation activities of tribal members.

1. *Brendale* Does Not Support the Proposition that Tribal Jurisdiction over Tribal Members Is Diminished on Reservation Fee Lands.

Indian tribes are sovereign political entities with inherent jurisdiction over their *members* and their territory. *See, e.g.*, *Cabazon*, 480 U.S. at 207; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *United States v. Mazurie*, 419 U.S. 554, 557 (1975); *McClanahan*, 411 U.S. at 168-170; *Williams v. Lee*, 358 U.S. 217, 220 (1959). In *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978), the Court held tribes possess inherent sovereign power to prescribe and enforce laws applicable to tribal members, including criminal laws. No federal law has eliminated the tribes' jurisdiction over their members and the tribes have not lost this power implicitly. *Id.* at 324-26.

Although this Court has limited tribal jurisdiction over *non-members*, it has not, contrary to Petitioner's argument, diminished tribal jurisdiction over tribal members on fee lands. In *Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1997), the Court explained the rationale for limitations on tribal jurisdiction over non-members:

> In *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes lack criminal jurisdiction over *non-Indians*. *Montana v. United States*, [450 U.S. 544 (1981)], decided three years later, is the pathmarking case concerning tribal civil authority over *nonmembers*. . . . The Court said in *Montana* that the restriction on tribal criminal jurisdiction recognized in *Oliphant* rested on principles that support a more "general proposition." 450 U.S.

> at 565. In the main, the Court explained, "the inherent sovereign powers of an Indian tribe" – those powers a tribe enjoys apart from express provision by treaty or statute – "do not extend to the activities of *non-members* of the tribe." *Ibid.*

(Footnote omitted; emphasis added.) Significantly, as *Strate* pointed out, *id.* at 447 n.6, this limitation on tribal authority over non-members "figured prominently" in *Brendale*, where a divided court held that a tribe has authority to zone fee lands owned by *non-members* only if such lands comprise a small portion of the area in question, but not if they comprise a large portion thereof. *See* 492 U.S. at 438-47 (Stevens, J., announcing the judgment of the Court in part and concurring in part).

In contrast to *Oliphant* and its progeny, *Wheeler* holds that tribes retain inherent sovereign authority, including *criminal* jurisdiction, over tribal members. As the Court stated in *Mescalero Apache Tribe*, 462 U.S. at 332, "[a] tribe's power to prescribe the conduct of tribal members has never been doubted. . . ." Thus, the "general proposition" derived from *Oliphant* regarding jurisdiction over non-members, which "figured prominently" in *Brendale*, has no application here.

In its most recent decision on the scope of tribal sovereignty, this Court reaffirmed the bedrock principle that tribal Indians have the right to make their own laws and be ruled by them. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). While the Court held that tribal control of land (either trust or fee land) might support tribal jurisdiction over *non-members* in some cases, it made no suggestion that land status had any bearing on tribal sovereignty and jurisdiction over

tribal members. *Id.* at 371-73; *see also id.* at 381 (Souter, J., concurring) (tribal jurisdiction "depends in the first instance on the *character of the individual* over whom jurisdiction is claimed, not on the title to the soil on which he acted") (emphasis added). In short, no decision of this Court (or any other court) restricts tribal jurisdiction over tribal members on reservation lands, regardless of the status of such lands as trust or fee lands. Petitioner's contrary and unprecedented interpretation of *Brendale* provides no basis for granting a writ of *certiorari*.[7]

2. *Colville* Does Not Minimize the Importance of Tribal Self-Government.

In 1959, in rejecting an assertion of state jurisdiction to adjudicate a civil dispute between a tribal member and a non-member which arose on a reservation, this Court held the controlling question is "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. Congress

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7. Because *Brendale* had no bearing on this case, there is nothing surprising about the fact that it was not cited in the court of appeals' decision. *Cf.* Pet. 15. Moreover, in suggesting that the court of appeals imposed a higher burden on Petitioner to demonstrate exceptional circumstances warranting state regulation on fee lands than trust lands, *id.*, Petitioner simply misreads the court's opinion. Petitioner conceded in the lower courts that it could not regulate the use and development of lands subject to federal restrictions on alienation, which comprise over half the reservation. Pet. App. 28a. It was entirely appropriate for the lower courts to consider Petitioner's conceded lack of jurisdiction on such lands in evaluating the interests it asserted in support of regulating unrestricted fee lands in this case. *See id.* at 18a, 28a. In considering this factor, the court of appeals did not place a higher burden on Petitioner to regulate fee as opposed to trust lands, or contravene any decision of this Court.

has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," *id.*, and the Court itself has "consistently guarded the authority of Indian governments over their reservations." *Id.* at 223. Accordingly, where an assertion of state jurisdiction "would undermine the authority of the [tribe] over Reservation affairs and hence would infringe on the right of the Indians to govern themselves," it is unlawful. *Id.*; *see also McClanahan*, 411 U.S. at 168-73.

In *Moe*, 425 U.S. at 468, the Court held Montana could not impose its cigarette taxes, personal property taxes, or vendor-licensing statutes on tribal members on the Flathead Reservation – on *fee* or trust lands – but upheld a state requirement that tribal smoke shops collect cigarette sales taxes from non-Indians. The Court found the State's interest in collecting its tax from non-Indians enjoying the State's off-reservation services sufficient to warrant the "minimal burden" imposed on the smoke shops. *Id.* at 483. It emphasized that the tax did *not* infringe on the Indians' right to make their own laws and be ruled by them, or otherwise frustrate tribal self-government. *Id.* The Court reaffirmed this holding in *Colville*, 447 U.S. at 156, 159.

In contrast, *Cabazon* held that California could not apply its gambling laws to tribal high-stakes bingo games that were open to the public and played predominantly by non-Indians. 480 U.S. at 204. The Court distinguished *Moe* and *Colville* because California's regulation would frustrate strong federal and tribal interests in tribal self-sufficiency and economic development. *Id.* at 217-19. The tribes were not "merely

marketing an exemption from state gambling laws." *Id.* at 220. Unlike the Indian cigarette vendors in *Moe* and *Colville*:

> the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide.

Id. at 219. The Court concluded that even the State's legitimate interest in combating organized crime was insufficient "to escape the pre-emptive force of federal and tribal interests apparent in this case." *Id.* at 221-22.

The court of appeals considered and fairly applied these precedents to the particular facts of this case. Pet. App. 17a-19a. The Constitution of the Tulalip Tribes was approved by the Secretary of the Interior under the Indian Reorganization Act, in which Congress "[r]eturn[ed] to the principles of tribal self-determination and self-governance which had characterized the pre-[General Allotment Act] era." *Yakima*, 502 U.S. at 255. The Constitution expressly vests authority in the Tribes' governing body to regulate "the use and disposition of property upon the reservation." CA Excerpts 71 at 89. In approving the Tribes' zoning ordinance, the Bureau of Indian Affairs found it furthered the "broad purposes of federal self-determination policy in favor of establishing and supporting tribal authority to

regulate activities conducted on the reservation." *Id.* at 84.[8] The ordinance was designed to "fulfill the purposes of the Reservation as the permanent homeland of the Tulalip people." CA Excerpts 84 at 65. The particular provision at issue in this case, which permits greater residential densities than current county regulations but also requires more open space, was "required to provide adequate housing for present and future generations of Tribal members," while at the same time protecting fisheries and other vital natural resources on the Reservation. *Id.*; *see* CA Excerpts 72 at 4-5.

As the court of appeals found, Petitioner's attempt to impose its own regulations and thereby prohibit a residential development approved by the tribe "does not constitute a 'minimal burden' like the one condoned in *Moe*" and *Colville*, but instead "threatens to supplant the Tribes's Ordinances (and thus its attempt at self-government)." Pet. App. 19a. Petitioner's assertion of jurisdiction under these circumstances would interfere with the Indians' right "to make their own laws and be ruled by them," *Williams*, 358 U.S. at 220, and conflict with Congress' goal of Indian self-government.

Petitioner's assertion of jurisdiction would also be contrary to Congress' intent to preclude the extension of state laws to Indians on a reservation. *McClanahan*, 411 U.S. at 175. Having submitted subdivision and rezone applications

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8. This finding is consistent with repeated statements of this Court regarding the particular importance of tribal zoning authority. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 n.14 (2001) ("zoning 'is vital to the maintenance of tribal integrity and self-determination'"), *quoting Duro v. Reina*, 495 U.S. 676, 688 (1990); *Brendale*, 492 U.S. at 433 (Stevens, J.) ("[z]oning is the process whereby a community defines its essential character").

to the tribe and obtained approvals under the tribe's laws, Respondent Gobin would now be subjected to a second, overlapping and conflicting regulatory regime. This result cannot be squared with the deeply rooted policy of leaving reservation Indians free from state jurisdiction and control. *Id.* at 168.

Moreover, Respondent Tulalip Tribes showed – and Petitioner did not dispute – that the provisions under which the tribe approved the development in this case are essential to the tribe's ability to provide adequate housing on its reservation while still protecting the reservation's vital natural resources. CA Excerpts 72 at 4-5. Thus, Petitioner's assertion of jurisdiction threatens the central purposes for which the reservation was created in the Treaty of Point Elliott.

Petitioner's attempt to reduce the important federal and tribal interests in this case to the marketing of an unfair competitive advantage over non-Indian developers ignores the evidence in the record and the principles of Indian self-government that have been at the core of this Court's Indian jurisprudence. Like *Cabazon*, 480 U.S. at 219-20, this case involves the creation of substantial on-reservation value and the provision of important on-reservation services, including land use planning, zoning, permitting, inspections, housing design and construction, and utilities. Unlike *Moe* and *Colville*, the purchasers "do not simply drive onto the reservation[], make their purchases and depart," *Cabazon*, 480 U.S. at 219, but make the reservation their *home*. Because the tribe and its members "are generating value on the reservation[] through activities in which they have a substantial interest," *id.* at 220, the federal and tribal interests

here are of paramount importance. In so holding, Pet. App. 19a, the court of appeals' decision did not conflict with any decision of this Court.[9]

3. Alleged Error in the Factual Application of the Exceptional Circumstances Test Does Not Warrant *Certiorari.*

The Petition identifies no features of the development at issue in this case that would be harmful to Petitioner. Instead, it asserts that the application of the decision to other developments will create problems for states, counties and tribes. Pet. 19-22. However, the lower courts considered each of the hypothetical concerns advanced by Petitioner, and properly concluded that they do not present "exceptional circumstances" warranting county regulation of the on-reservation activities of tribal members *in this case.* This fact-bound determination does not warrant review in this Court.

Petitioner first asserts that as "a general proposition" administrative problems will result from a system in which zoning and land use jurisdiction shift between local and tribal governments based upon whether a member or non-member owns the land at any given time. Pet. 19. However, this is

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9. Petitioner's suggestion that only economic development activities undertaken by a tribe itself can further the congressional goal of Indian self-sufficiency and economic development, Pet. 16 n.4, 17 n.5, is premised on an erroneous, socialistic conception of modern Indian tribes. The entrepreneurial activities of individual tribal members, undertaken on a reservation subject to tribal regulation, can further and may well be essential to the achievement of the twin goals of Indian economic development and self-sufficiency.

the inevitable consequence of this Court's jurisprudence regarding jurisdiction on Indian reservations. *See, e.g.*, *Yakima*, 502 U.S. at 265 (noting that *Brendale* affirmed "checkerboard" with respect to zoning power over reservation *fee* land). And, as the record in this case demonstrates, any resulting administrative problems can be addressed by inter-governmental efforts to coordinate zoning and land use regulations, and to provide notice and an opportunity to comment on land use applications (such as the notice provided to Petitioner in this case). *See* Pet. App. 19a (noting "similarities between County and tribal land use regulations"); CA Excerpts 71 at 120 (Memorandum of Agreement between Petitioner and Respondent Tulalip Tribes providing for notice to "one another . . . of pre-application or other development proposals").

Second, Petitioner asserts that tribal members and non-members could engage in sham transactions to circumvent land use restrictions, and that this would be especially problematic on "reservations where the resident tribe has no land use code, or no ability to enforce its code." Pet. 19-21. Petitioner does not suggest that these circumstances are present here, and it recognizes that tribal and non-tribal governments have a mutual interest in preventing such transactions. Although Petitioner asserts that "neither a county nor a tribe may confer jurisdiction on the other by agreement," *id.* at 20, it does not explain why counties and tribes cannot work together to notify each other of potential sham transactions and take enforcement actions to prevent them.

Finally, Petitioner asserts it is difficult to determine whether a tribal member owns or has some legal interest in a particular parcel of land. Pet. 21. Again, Petitioner makes no

suggestion that it encountered any such problem in this case, and it submits an extra-record document that confirms its ability to determine tribal membership status by simply asking the tribe. *See* Pet. App. 46a (¶ 5). Since states, counties and tribes have mutual interests in insuring compliance with land use regulations, there is no reason to believe this concern cannot be addressed through cooperative inter-governmental arrangements.

Under these circumstances, the lower courts' factual determination that Petitioner did not demonstrate the existence of "exceptional circumstances" justifying a departure from "the well-established policy of leaving Indians free from state jurisdiction and control," Pet. App. 19a, 30a, does not merit review in this Court.

III. *CERTIORARI* IS NOT WARRANTED BECAUSE THIS CASE DOES NOT PRESENT A SUFFICIENTLY IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT IN THE ABSENCE OF FURTHER CONSIDERATION IN THE LOWER COURTS.

As Petitioner concedes, the court of appeals' decision in this case is the first federal or state appellate decision to address state or local regulation of Indian development of Indian-owned fee lands in Indian country. Indeed, as noted above (note 3) we are aware of only two other trial court decisions that have addressed the issue, both of which concluded that such regulation could not be sustained.

The very limited amount of litigation on this narrow issue of federal Indian law counsels against plenary review in this Court at this time, particularly in a case in which the development at issue will have no material adverse impact on the county or its residents. Because tribes have limited jurisdiction over non-members, and state and local governments have limited jurisdiction over tribal members, many tribes and local governments are entering into cooperative agreements to address land use issues in Indian country. The paucity of litigation suggests their efforts have been successful in avoiding jurisdictional conflicts. In the event such conflicts do develop, they should be addressed first in the lower federal and state courts. Those courts are best equipped to consider varying patterns of land ownership, issues arising from joint Indian – non-Indian development efforts, and the consequences of particular development projects, and they are in the best position, at least in the first instance, to make fact-bound determinations of "exceptional circumstances."

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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